Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIE COLWELL, JR.

Petitioner

VS.

STATE OF INDIANA

Respondent

On Petitioner for Writ of Certiorari
To The Court of Appeals of Indiana

PETITION FOR WRIT OF CERTIORARI

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8688

QUESTIONS PRESENTED FOR REVIEW

I. CONSTITUTIONAL VIOLATIONS ARE NOT HARMLESS ERROR UNLESS THE VIOLATIONS ARE HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER INDIANA CAN DENY THE PETITIONER'S RIGHT TO REVIEW A VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY HOLDING THAT THE FILING OF A MOTION TO SUPPRESS IS INSUFFICIENT TO PRESERVE AN ISSUE FOR APPEAL.

III. WHETHER THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN THE TRIAL COURT OVERRULED HIS MOTION TO REVEAL THE IDENTITY OF THE STATE'S INFORMANT, PROVIDE HIM WITH THE TAPE OF THE ALLEGED DRUG BUY, AND THE TAPE OF ORAL REPRESENTATIONS MADE TO A JUDGE IN ORDER TO OBTAIN THE SEARCH WARRANT AT ISSUE.

IV. WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM BY DENYING HIS MOTION FOR SEVERANCE AND ADMITTING THE NON-TESTIFYING CO-DEFENDANT'S PRE-TRIAL STATEMENTS.

V. WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL DUE TO MISCONDUCT OF THE PROSECUTOR.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are those contained in the caption of the case in this Court, namely;

WILLIE COLWELL, JR. .....PETITIONER

STATE OF INDIANA .....RESPONDENT

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OPINION BELOW

The Court of Appeals of Indiana, Cause No. 15A01-9708-CR-274 affirmed the Petitioner's conviction from the Dearborn Circuit Court, State of Indiana on July 21, 1998 which was not recommended for publication. The Petitioner then filed a Petition to Transfer to the Indiana Supreme Court which was denied on September 22, 1998. A copy of the Memorandum Decision of the Court of Appeals of Indiana and the Order denying the Petition to Transfer from the Indiana Supreme Court is appended hereto.

JURISDICTIONAL GROUNDS

I. The Order denying the Petition to Transfer to the Indiana Supreme Court was entered on September 22, 1998.

II. No requests for rehearing were made and one extension was requested and granted on December 15, 1998 for additional time to file this Petition.

III. The Supreme Court has jurisdiction to grant certiorari in this case and the statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following Constitutional Provisions are involved:

The Fourth Amendment to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

> the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Section 1 of the Fourteenth Amendment to the United States Constitution states as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND BASIS FOR FOR FEDERAL JURISDICTION

This case involves a violation of the Defendant's Fourth, Sixth and Fourteenth Amendment rights guaranteed to him by the United States Constitution.

The Petitioner, Willie Colwell, Jr., who had no prior record was convicted for dealing and possessing cocaine, maintaining a common nuisance and possession of marijuana. He was sentenced to 30 years and is not eligible for parole until he serves 15 years. (Record at 262-266 and 1860).

The physical evidence introduced at trial against the Petitioner was seized as a result of a search warrant that the Petitioner continues to maintain was issued in violation of his Fourth and Fourteenth Amendment rights.

A search warrant was procured by Detective Nickel with the aid of an

alleged "confidential informant". (Record at 412-13). The informant had no prior history of cooperating with Detective Nickel or any other law enforcement officer. (Record at 417). Regardless, the Detective wired the informant and asked him to make a drug sale at 523 Margaret Street. (Record at 417, 438, 439 and PC Hearing in Record at 670 at pp. 2-3). The informant drove to the address and allegedly transferred the cash he was given for what "appeared" to be cocaine. The confidential informant left the house and ten minutes later he delivered a bag of white powder to the Detective at a different location. (Record at 500 and PC Hearing in Record at 670 at pp. 2-4). The Detective did not observe the transaction or hear it while it was allegedly being taped. (Record at 438-439).

The Detective appeared before a judge on August 9, 1996 and orally informed him of the alleged sale and a search warrant was issued to enter the Petitioner's residence to search any adult person found therein for cocaine and other items associated therewith. (Record at 54 and 671). The tape of the transaction was not provided to the reviewing judge to review, the cocaine was not observed and the reliability of the informant was not disclosed. (Record at 440-448 and PC Hearing in Record at 2-6).

A hearing was held on the Petitioner's Motion to Suppress the evidence seized during the unlawful search. The court not only did not overrule the Motion until the morning of trial, but cited no reasons for doing so, and refused to permit the Petitioner to listen to either the tape of the alleged

transaction or the tape of the alleged statements made by the Detective to the judge for the issuance of the warrant. (Record at 76-77, 95-96, 152, 154, 199-214 and 819-820).

The Petitioner also filed a Motion to Sever his trial from that of his co-defendant, which the trial court overruled. (Record at 158 and 661). As a result, the Petitioner was denied his right to confront witnesses against him guaranteed by the Sixth Amendment because pre-trial statements made by the co-defendant, who did not testify, and which implicated the Petitioner were introduced at trial. (Record at 1389-91 and 1402-03).

The State continuously violated the trial court's discovery orders to the extreme prejudice of the Petitioner which ultimately denied him his constitutional right to a fair trial. Lab results were

withheld for more than three months and the Court was lied to about when they were received, and the Petitioner believes as a result, he was ultimately denied his request for an independent examination. (Record at 87-88, 398-399, and 483-485). It also took the State more than three months to provide the Petitioner with the co-defendant's pre-trial statements that had been given only two days after her arrest, when the State had them all along.

While the court granted the Petitioner's motion to require the State to disclose all deals with its witnesses, it was not until two working days prior to trial that the Petitioner received information that the co-defendant would be testifying against him and the plea bargain was not disclosed until the morning of trial. (Record at 97-100, 120-121, 1174, 1191, and 1193).

The Petitioner's constitutional right to a fair trial was also violated by the misconduct of the State at trial. Over the Petitioner's objection, the State continued to elicit testimony as to the existence of a child's room at the searched residence when no drugs were found in that room, or other evidence; that a child lived at the searched residence, that the co-defendant had given a child up for adoption and that the Petitioner had supported his live-in girlfriend's cocaine addiction while she was pregnant with his baby. (Record at 1098-99, 1362, 1397-99, 1491, 1495 and 1720-21). These statements were irrelevant and highly prejudicial to the Petitioner.

ARGUMENT FOR GRANTING WRIT

I. CONSTITUTIONAL VIOLATIONS ARE NOT HARMLESS ERROR UNLESS THE VIOLATIONS ARE HARMLESS BEYOND A REASONABLE DOUBT.

The Petitioner maintains that prior to his arrest, throughout pre-trial preparations and during his trial, he was denied his rights guaranteed to him by the Fourth, Sixth and Fourteenth Amendments. The Court of Appeals of Indiana agreed with the Petitioner that errors had occurred at his trial, however, it found that the errors were harmless. Yet, the errors were constitutional errors and before a "constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). The Constitutional errors which occurred in the Petitioner's case were of the most egregious kind, and, therefore, there is nothing upon which to base a belief that they were harmless beyond a reasonable doubt. For these reasons, this Court

should grant the Petitioner's request for a Writ of Certiorari.

II. WHETHER INDIANA CAN DENY THE PETITIONER'S RIGHT TO REVIEW A VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY HOLDING THAT THE FILING OF A MOTION TO SUPPRESS IS INSUFFICIENT TO PRESERVE AN ISSUE FOR APPEAL.

The Petitioner maintains that Indiana's cannot deny his right to have a higher court review a violation of his Fourth and Fourteenth Amendment rights by holding that a motion to suppress does not preserve error for appellate review (Poulton v. State, 666 N.E.2d 390 (Ind. 1996). It is the Petitioner's position that this is unconstitutional and violates his Fourth and Fourteenth Amendment rights against unlawful searches and seizures. This Court has held that "the security of persons and property remains a fundamental value..." Alderman v. United States, 395 U.S. 165 (1969), and, all evidence seized in

violation of the Fourth and Fourteenth Amendments shall be excluded from trial. Mapp v. Ohio, 367 U.S. 643 (1961).

Here, the Petitioner filed a Motion to Suppress evidence seized based upon the issuance of an unlawful search warrant which violated his Fourth and Fourteenth Amendment rights on numerous grounds; requested that the Court permit the Petitioner to listen to the tape which was the basis of the search warrant; and requested to hear the tape of oral representations made by the Detective to the judge who issued the search warrant. The trial court overruled the Petitioner's motions to listen to the two tapes prior to trial, but did not overrule the Petitioner's Motion to Suppress until the morning of trial when the Petitioner reminded him that he had not yet ruled (Record at 152, 154, 819-820). The Court cited no reason

for his decision. In his appeal, the Petitioner raised the validity of the search warrant as an error. The Court of Appeals, however, refused to address whether or not the Petitioner's Fourth Amendment rights were violated because the Petitioner did not object to the admission of the evidence at trial.

Indiana requires a defendant to not only file a motion to suppress, but if overruled, to ignore the trial court's ruling and object at trial when the evidence is admitted. This law is unconstitutional. In Manness v. Meyers, 419 U.S. 449, 459 (1975), this Court stated counsel should not engage the court in extended discussion once a ruling is made. In the instant case, the trial court had already ruled on the admissibility of the evidence seized when it overruled the Petitioner's Motion to Suppress. The Petitioner would have had

to have objected to every question the State asked. The Petitioner would have had objected to the State's introduction of all testimony having to do with being at the unlawfully searched house, what they saw at the unlawfully searched house, what they did at the unlawfully searched house, what was examined as a result of the unlawful search, and what information and statements were derived as a result of the unlawful search in order to preserve his constitutional rights. Obviously, the multitude of objections would not have endeared the Petitioner before the jury, and effectively denied him not only his Fourth Amendment right, but also his right to a fair trial before a jury. Not only is this law in direct contravention with this Court's statement in Manness, it also places a restraint on the Petitioner's constitutional rights

because it denies the Petitioner the right to have constitutional errors of the trial court reviewed by a higher court. This error should have been reviewed by Indiana to ensure that the Petitioner is not denied his constitutional right against unlawful searches and seizures which is a fundamental right. Indiana's refusal to review whether or not the Petitioner's Fourth Amendment rights were violated was unconstitutional and took away the Petitioner's right to appeal to a higher court. Therefore, this Court should review this constitutional error.

III. **WHETHER THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN THE TRIAL COURT OVERRULED HIS MOTION TO REVEAL THE IDENTITY OF THE STATE'S INFORMANT, PROVIDE HIM WITH THE TAPE OF THE ALLEGED DRUG BUY, AND THE TAPE OF ORAL REPRESENTATIONS MADE TO THE JUDGE IN ORDER TO OBTAIN THE SEARCH WARRANT AT ISSUE.**

The Petitioner maintains that his Sixth Amendment rights were violated when

the trial court overruled the Petitioner's motions to require the State to provide the Petitioner with the tape of the alleged drug buy used to support the issuance of the search warrant in this case, the disclosed identity of the State's alleged "confidential" informant and to permit the Petitioner to listen to the tape of the oral representations made to the judge - all of which were the basis for the search warrant and, therefore, imperative to his defense. (Record at 78-79 and 362-370). Pursuant to Roviaro v. United States, 353 U.S. 53, 60 (1957) the government must reveal the identity of its confidential informants, or the contents of his communication, where the disclosure "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . ." In Roviaro, this Court further stated that where the

communications of the informer are claimed to establish probable cause, the government has been required to disclose the identity of the informant. Id.

Here, the search warrant was issued solely on the content of an alleged taped buy made by an unidentifiable person, therefore, his or her identity was imperative to the Petitioner's defense. The Petitioner should have been able to attack the truthfulness and the reliability of the information provided by the informant, together with the oral representations made to the issuing judge, in order to challenge the validity of the search warrant.

IV. **WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM BY DENYING HIS MOTION FOR SEVERANCE AND ADMITTING THE NON-TESTIFYING CO-DEFENDANT'S PRE-TRIAL STATEMENTS.**

It is the Petitioner's position that when the trial court overruled his

motions to sever and admitted the out-of-court statements of the co-defendant which implicated him, the Petitioner was denied his constitutional right to confront witnesses against him guaranteed by the Sixth Amendment. The right to confrontation entails the right to cross-examination. Douglas v. Alabama, 380 U.S. 415(1965).

This Court held that where out-of-court statements of a co-defendant which implicate a defendant are admitted at a joint trial and the co-defendant does not testify at trial, the defendant's constitutional right of confrontation has been violated. Bruton v. United States, 391 U.S. 123 (1968).

Here, the Petitioner filed motions to sever his trial from that of his co-defendant and continued to attempt to convince the trial court that if they were tried together and the statements

came in, it would be reversible error. (Record at 80-83, 158-161, 220, 659 and 706-714). The trial court overruled the Petitioner's motions, and the co-defendant's statements were admitted into evidence. The co-defendant did not testify at trial, and, therefore, the Petitioner was unable to cross-examine her. Although the trial court attempted to delete the references to the Petitioner in the co-defendant's statement, as admitted, still contained several implicating references. (Record at 1389-91 and in Record at 1830 at pp. 1-38). For example, the State questioned the Detective about three bottles found during the search of the residence containing phosphagen, inositol, and choline cocktail and as to what the co-defendant stated these substances were used for, to which he responded, "She stated that it was used to dilute cocaine

so they could make more money..." (Record at 1402-3). The use of the word "they" implicated the Petitioner, as the jury would reasonably conclude that "they" referred to the co-defendant and the Petitioner, and indicated that he and the co-defendant diluted cocaine to earn more money. In fact, the Court of Appeals of Indiana agreed with the Petitioner that the jury could have understood the use of "they" to reference both Gohman and Colwell. (Decision at 18.)

Since Gohman did not testify at trial and the statement was admitted without deleting the implicating references to the Petitioner, the Petitioner was unable to cross-examine Gohman as to the truth and substance of the statement. Therefore, the Petitioner's constitutional right to confront witnesses against him was

denied, resulting in actual prejudice to him.

V. WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL DUE TO REPEATED MISCONDUCT OF THE PROSECUTOR.

The Petitioner maintains that he was denied his constitutional right to a fair trial guaranteed to him by the Fifth, Sixth and Fourteenth Amendments. The Petitioner's trial was replete with prosecutorial misconduct warranting reversal and dismissal of his conviction, as the misconduct rose to a level that it completely denied his right to a fair trial.

First, the State repeatedly introduced irrelevant evidence regarding the existence of a child's room in the searched residence and the fact that the co-defendant had given a child up for adoption. Despite repeated objections by the Petitioner during the State's case-

in-chief, she asked whether or not the co-defendant told the Detective if she had any children and if they lived with her. (Record at 1397). The Detective testified: "She indicated that she had two children, and one that she had given up. . ." (Record at 1397). The State again elicited testimony that a young child resided with the co-defendant at the searched residence, when she knew the co-defendant never told the Detective that a child lived at the residence. (Record at 1398-99, 1491 and Record at 1830 at pp. 1-2).

The only purpose for introducing this evidence was to needlessly and prejudicially concern the jury with the welfare of a child which had nothing to do with the Petitioner's guilt or innocence. The State deliberately violated the trial court's order by introducing evidence extremely

prejudicial to the Petitioner, which in and of itself is grounds for a mistrial.

Second, the State repeatedly and deliberately commented on the fact that the co-defendant ingested cocaine while pregnant. For instance, during redirect examination of the Detective, the State asked whether the co-defendant was addicted to cocaine for approximately a year, to which the Detective responded "Yes, that was in August of 1996, she was saying she was addicted the whole year prior." The State then asked "and didn't she also tell you that she had a baby in January of 1996?" over the Petitioner's objection and motion for mistrial. (Record at 1492-98). The State also, elicited testimony that the co-defendant was pregnant during the pre-trial proceedings of this action. (Record at 1492-98). Again, the Petitioner objected and moved for a mistrial. The motion was

denied but the objection was sustained and the jury admonished. (Record at 1498).

The Petitioner also made a motion to specifically prevent the State from essentially arguing about the existence or non-existence of crack babies and matters related to that effect. (Record at 1615-16 and 1633-37). In granting the Petitioner's motion, the trial court stated "I do not want to hear that mentioned. . . That would be prejudicial." (Record at 1616). Regardless, during her closing argument, the State stated "The amount that is there, the fact that his live-in girlfriend is addicted... addicted, even while she is pregnant and he is giving it to her." (Record at 1720-21). The Petitioner moved for a mistrial which was denied. (Record at 1720-21).

This Court has held that prosecutors are "to refrain from improper methods calculated to produce a wrongful conviction... while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). Here, the Prosecutor's comments run afoul of this Court's holding, violated the trial court's order, and was prosecutorial misconduct of the most egregious kind. The State knew these statements would have an extremely prejudicial effect upon the jury, especially in light of the jury foreman's comments with regard to crack babies during voir dire. (Record at 932-33 and Supplemental Record at 96-101).

This comment had no relevance to the case at hand and was nothing more than prejudicial and vindictive and denied the Petitioner his constitutional right to a fair trial. In fact, the Court of Appeals

of Indiana agreed with the Petitioner that this comment was in direct violation of the trial court's Order and constituted misconduct. (Decision at 15). During this day and age with the community stigma against drugs and children being raised in a home where drug use is apparent to a child, placing a child in harms way and the risks associated with drug use during pregnancy, no reasonable juror could set this evidence aside in determining the Petitioner's guilt or innocence.

Third, the State deliberately and intentionally failed to comply with the court's discovery orders which required the State to provide the Petitioner with all reports, including results of physical or mental examinations and of scientific tests, experiments or comparisons within 30 days. (Record at 38-41). Almost four months after the

court's discovery order, the State had yet to provide the Petitioner with a copy of the lab report on the alleged cocaine. When the Court asked the State if she had the results back, she lied and said no. (Record at 87-88). Once outside chambers, the Petitioner asked the detective about the report and he indicated that he had it with him. The State physically stopped him from giving the Petitioner the drug report. As it turns out, the report had been completed since October 17, 1996. (Record at 258, 388-392).

The Prosecutor later admitted to the Court that she had the drug report at the last hearing and the Detective verified that the Prosecutor had kept the report from the Petitioner (Record at 398-399 and 483-485). The Court did nothing. (Record at 104-105 and 354-355).

As a result, the Petitioner was unable to timely file a motion for an

independent drug examination, since he was unaware of the lab results until February 1st , 1997. (Record at 150-151 and 109-112).

The State also violated the court's order regarding written and recorded statements. The State had in their possession a recorded statement of the co-defendant taken after her arrest. As of January 31, 1997, the State had not complied with the court's order some four months overdue.

In addition, per the court's discovery order, the State was ordered to provide the Petitioner with the names of all witnesses the State intended to call, together with their relevant written or recorded statements. (Record at 39). In addition, the Petitioner filed a motion to disclose all deals with the prosecution witnesses on January 15, 1997 which was granted. (Record at 97-100 and

120-121). Yet, it was not until two working days prior to trial, that the Petitioner received information from the State that a co-defendant would be testifying. (Record at 194 and 1191). The State claimed she provided the Petitioner with the anticipated testimony of Slaughter in her Supplemental Discovery Answer by fax on April 14 and that the plea agreement between Slaughter and the State was attached, when it was not. (Record at 1174 and 1193). The Petitioner did not receive the fax and the plea agreement also was not attached to the original Supplemental Discovery Response filed with the court on April 14. (Record at 194). Once again the State lied to the court and deliberately and willfully kept material evidence from the Petitioner.

"A prosecutor has a duty to disclose `deals' made with a State's witness, such as promises, grants of immunity, or

rewards in exchange for testimony. See Davis v. Alaska, 415 U.S. 308 (1974) and Green v. McElroy, 360 U.S. 474 (1959). Since the Petitioner was never informed as to the statements that could be used against him, the plea agreement with the co-defendant and his previous criminal record the morning of trial, the Petitioner was unable to adequately cross-examine the witness in violation of his right to confrontation and his fundamental right to a fair trial.

In light of all the State's deliberate and willful discovery violations, the Petitioner was unable to adequately prepare pre-trial motions necessary for his defense and to adequately prepare for trial.

Due to the numerous instances of misconduct and the egregious comments made by the State, it is clear that she attempted to obtain a conviction by

denying the Petitioner timely discovery and interjecting irrelevant and highly prejudicial comments to the jury. The Petitioner was denied his constitutional right to a fair trial and to confrontation.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DENNISON & ASSOCIATES

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APPENDIX

A

STATE OF INDIANA

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H. John Okeson
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Cause Number
15A01-9708-CR-00274
Lower Court Number:
15C019608CF24

GOHMAN, ANGELA -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 9/22/98

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED TO CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITIONER TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICE CONCUR ***WILLIE COLWELL, JR.

WITNESS my name and the seal of said Court, this 22ND day of SEPTEMBER, 1998.

"S/_____"
Clerk Supreme Court, Court
of Appeals and Tax Court

Pursuant to Ind. Appellate Rule 15(A)(3), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
JULY 21, 1998
CLERK OF THE INDIANA SUPREME COURT
COURT OF APPEALS AND TAX COURT

IN THE
COURT OF APPEALS OF INDIANA

ANGELA GOHMAN and WILLIE COLWELL, JR.	)	
Appellants-Defendants,	)	
vs.	)	No.15A01-9708-CR-274
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable Anthony C. Meyer, Judge
Cause No. 15C01-9608-CF-24

July 21, 1998

MEMORANDUM DECISION - NOT FOR PUBLICATION
DARDEN, Judge

ATTORNEY FOR APPELLANTS:

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STATEMENT OF THE CASE

Co-defendants Angela Gohman and Willie Collwell, Jr. appeal their convictions following a jury trial of possession of cocaine in an amount greater than three grams with the intent to deliver, a class A felony; maintaining a common nuisance, a class D felony; and possession of marijuana, a class D misdemeanor.[1]

We affirm.

ISSUES

Gohman raises the following issues:

I. Whether sufficient evidence exists to support Gohman's conviction for possession of cocaine with the intent to deliver.

II. Whether Gohman was denied effective assistance of counsel due to trial counsel's dual representation of Colwell.

III. Whether the trial court abused its discretion in denyng her motions for mistrial.

---

[1] This court ordered a consolidation of the separate appeals filed by Gohman and Colwell pursuant to Ind. Appellate Rule 5(B).

Collwell presents numerous issues, which we restate as follows:

I. Whether the prosecuting attorney engaged in prosecutorial misconduct subjecting Colwell to grave peril.

II. Whether the trial court abused its discretion in denying Colwell's motion for severance.

III. Whether the trial court erred by permitting the State to commit a Doyle violation.

IV. Whether the trial court erred in overruling Collwell's motion to suppress.

V. Whether the trial court erred in denying Colwell's motion to reveal the identity of the State's informant and to provide him with the tape of the alleged drug transaction which was used to support the issuance of the search warrant.

VI. Whether the trial court committed reversible error in admitting certain evidence.

STATEMENT OF THE FACTS

The evidence most favorable to the verdict reveals that in August of 1996, co-defendant Willie Colwell, Jr. and Angela Gohman lived together in a home at 523 Margaret Street in Lawrenceburg (the

residence). On August 9, 1996, Greg Slaughter called Colwell twice to arrange to buy $250 worth of cocaine at the residence. After Slaughter arrived at the residence, he entered the house and sat in a chair in the living room. Slaughter then gave Colwell $250. In Slaighter's presence, Colwell retrieved some cocaine out of a bag on the living room table, weighed in on an electronic scale, and placed it inside a small sandwich bag. While Colwell weighed the cocaine on the table, Gohman prepared a small sample of the cocaine for Slaughter to snort so that Slaughter could "see what the quality of it was." (R. 1161). Colwell then gave Slaughter the small bag of cocaine.

At about this time, the Indiana State Police and the Dearborn County Sheriff's Department executed a search

warrant at the residence. After knocking and announcing themselves, the police kicked in the front door and entered the residence. The police instructed Colwell, Gohman and Slaughter to get down. Gohman fled toward the master bedroom. Officer John Yung gave chase and apprehended Gohman, who had crouched down between the waterbed and the closet in the master bedroom. Officer Yung testified that he observed the mattress moving when he entered the bedroom to apprehend Gohman.

After securing the residence, the police conducted pat-down searches of Gohman, Colwell and Slaughter. During the pat-down search, officers discovered a plastic bag containing 2.8 grams of cocaine in Gohman's pocket, a plastic sandwich bag containing 2.3 grams of cocaine in Slaughter's pocket, and a wallet containing more than $1,500 in

cash in Colwell's pocket. During the search of the residence, officers seized the following items from the living room: a baggie containing 7.4 grams of cocaine; a plastic bag containing two small plastic bags of marijuana; an electronic digital scale; an open box of sandwich bags; and an adding machine. In addition, officers seized 19.2 grams of cocaine and $9,000 in cash concealed under a cover on the waterbed in the master bedroom where Gohman had fled to during the execution of the search warrant. Two food supplements commonly used to dilute cocaine were also seized from the residence.

The State charged Gohman and Colwell in a joint information with possession of cocaine more than three grams with intent to deliver, possession of cocaine more than three grams, maintaining a common nuisance, and possession of marijuana

less than three grams. Slaughter subsequently pleaded guilty to an amended charge of possession of cocaine less than three grams and testified against Gohman and Colwell, who were both represented by attorney Deanna Dennison at their joint trial. Additional facts will be provided as needed.

DECISION

Gohman

I. Sufficiency

Gohman claims that insufficient evidence exists to support her conviction for possession of cocaine with the intent to deliver. Specifically, she claims that the evidence was insufficient to show she intended to deliver the cocaine found on her possession and in her residence when she was arrested. We disagree.

We do not reweigh the evidence or judge the credibility of the witness when

assessing the sufficieny of the evidence on appeal. Godner v. State, 685 N.E.2d 1058, 1062 (Ind. 1997). Instead, the evidence is considered in a light favorable to the verdict, combined with any reasonable inferences which may be supported by that evidence. Id. If we find that there is substantial evidence of probative value from which a rational trier of fact could have found guilt beyond a reasonable doubt, then we will affirm. Bradford v. State, 675 N.E.2d 296, 298 (Ind. 1996), reh'g denied.

Intent is a mental state of the actor, and because it is often the case that an actor does not verbally express intent, the trier of fact must resort to reasonable inferences based on examination of the surrounding circumstances to determine intent. Mitchell v. State, 557 N.E.2d 660, 664 (Ind. 1991). Circumstantial evidence of

intent to deliver, such as possession of a large quantity of drugs, large amounts of currency, scales, plastic bags, and other paraphernalia as well as evidence of other drug transactions, can support a conviction. McGuire v. State, 613 N.E. 2d 861, 864 (Ind.Ct.App. 1993).

Here, we find that sufficient evidence exists to sustain Gohman's conviction. First, at the time of her arrest, Gohman had in her possession a baggie containing 2.8 grams of cocaine. Next, Officer Yung testified that he observed the waterbed mattress moving when he entered the master bedroom to apprehend Gohman. A reasonable jury could infer that when Gohman fled to the master bedroom, she was attempting to conceal the 19 grams of cocaine and the $9,000 found under a cover on the waterbed. Also, police seized two food supplements commonly used to dilute

cocaine. In the living room, police seized a bag containing 7.4 grams of cocaine, an electronic scale, and baggies. Finally, Slaughter testified that while Colwell weighed and packaged the cocaine in open view, Gohman prepared a "line" of the cocaine so that he could sample the quality of it. Officer Nickell testified that cocaine dealers frequently offer customers a line of cocaine to determine if the buyer is a police officer or confidential informant. The jury had sufficient evidence to find that she intended to deliver cocaine.

II. Conflict of Interest -- Waiver

After her arrest, Gohman gave a police statement implicating Colwell in the crimes charged. Later, Gohman and Colwell retained Deanna Dennison as counsel and signed a "Waiver of Dual Representation," which reads as follows:

> The Defendant[s], WILLIE COLWELL and ANGELA GOHMAN, do hereby acknowledge and waive the right to separate representation by Counsel in the above-styled action. Both parties are aware that they may or may not have inconsistent defenses and have the right to be represented by individual counsel. Both parties are aware of their rights in regards to this issue and have chosen to waive same. Both WILLIE COLWELL and ANGELA GOHMAN do hereby submit that they wish for Counsel for the Defendant to present them both.

(R. 73). At a preliminary hearing, the trial court advised Gohman and Colwell of the potential conflicts of interest because of the dual representation. The following dialogue occurred between the trial court and the defendants:

> COURT: Let the record show that this had to do with the dual representation of two (2) persons who may have conflicts of interest and the Court does not know today if there really is one except for a statement made by one of the parties, Angela Gohman.
>
> *****
>
> Are you aware of the statement that the Prosecuting Attorney just read? Did you hear that?
>
> COLWELL: Yes.

COURT: A statement allegedly made by Ms. Gohman. Ms. Gohman, did you hear that?

GOHMAN: Yeah.

*****

COURT: Do you understand that that makes a possible conflict of interest for your counsel in the sense that that statement might tend to incriminate...that alleged statement might tend to incriminate one of you?

COLWELL: Yeah.

*****

COURT: Are you requesting this Court that you retain the same counsel then?

COLWELL: Yes.

COURT: We are talking about Ms. Dennison. And, are you requesting that Ms. Gohman?

GOHMAN: Yes.

COURT: In spite of the fact that you know those things you still wish to continue with Ms. Dennison as your counsel?

*****

GOHMAN: Yes.

*****

PROSECUTOR: I would just want to state for the record also that there would be a conflict not only in the statements, but as to who possessed the cocaine.

COURT: Do you understand that also? There could be a conflict between the two (2) of you regarding who actually possessed the cocaine and not just in the statement?

COLWELL: Yeah.

COURT: Again, I am asking you do you still wish to continue with one (1) counsel?

*****

GOHMAN: Yes.

(R. 709-713). The trial court, noting that the defendants have a constitutional right to the lawyer of their choice, then granted Colwell and Gohman's request to dual representation at trial.

On appeal, Gohman alleges that she was denied effective assistance of counsel because her lawyer had a conflict of interest. The State responds that Gohman waived her claim of ineffective assistance of counsel based on a conflict of interest because Gohman expressly stated that she understood the potential for conflict but still requested

representation by the same counsel as her co-defendant. We agree with the State.

The Sixth Amendment to the United States Constitution guarantees to all criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel under the Sixth Amendment encompasses the right to select and be represented by one's preferred, privately retained counsel. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). The Amendment also entails "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)(citations omitted). However, the right to conflict-free representation,

like the right to counsel itself, can be waived by a defendant. Holloway v. Arkansas, 435 U.S. 475, 483, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 n.5(1978)("a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests."); see also Bieghler v. State, 690 N.E.2d 188, 197 (Ind. 1997), reh'g denied (finding "Bieghler made a knowing and intelligent waiver of any potential conflict in open court").

Once a criminal defendant has made a knowing and intelligent waiver of the right to conflict-free counsel, the waiver is binding and bars any subsequent claim of ineffective assistance of counsel stemming from that conflict. See, e.g., United States v. Lowry, 971 F.2d 55, 60 (7th Cir. 1992); Henderson v. Smith, 903 F.2d 534, 537 (8th Cir.

1990); Duncan v. Alabama, 881 F.2d 1013, 1017 n.5 (11th Cir. 1989). To hold otherwise would be to render the waiver meaningless; a defendant would lose nothing by waiving his right and remaining with counsel who had a conflict, since he could always assert ineffective assistance if convicted. Lowry, 971 F.2d at 63.

Turning to the fact of this case, Gohman faced the dilemma of whether to 1) waive the right to conflict-free counsel and remain with her initial choice of counsel, knowing that an actual conflict of interest might prevent her attorney from aggressively pursuaing some strategic avenues; or 2) refuse to waive any conflict of interest and go to trial represented by a different attorney. Gohman, after being fully advised in open court of the potential conflicts of interest, reconciled the risks and the

gains of dual representation and twice opted to waive her right to conflict-free counsel to keep Dennison as her counsel. In addition, Gohman executed a written waiver form. She does not contend, and the record does not reflect, that her waived was anything other than an informed and intelligent waiver. Accordingly, we conclude that Gohman waived her right to conflict-free counsel, and therefore, we need not reach the merits of her ineffective assistance of counsel claim based on counsel's alleged conflict of interest.

III. Motions for Mistrial

A trial court's determination of whether to grant a motion for a mistrial is afforded great deference on appeal because the trial court is in the best position to evaluate the circumstances and their impact on the jury. Kent v. State, 675 N.E.2d 332, 335 (Ind. 1996).

To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Bradley v. State, 649 N.E.2d 100, 107 (Ind. 1995). The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct. Kent, 675 N.E.2d at 335. Moreover, a mistrial is an extreme remedy, costly in consequences, warranted only when no other measure can rectify the situation. Deckard v. State, 670 N.E.2d 1, 4 (Ind. 1996).

A. Prejudicial Testimony

The trial court granted Gohman and Colwell's motion in limine to prevent the State from introducing any welfare

documents evidencing that Gohman had given up a child for adoption. During cross-examination of Detective Terry Nickell,[2] defense counsel elicited testimony that Gohman indicated in a police statement given in August 1996 that she had been addicted to cocaine for over a year. On redirect examination, the prosecutor elicited testimony that Gohman said in her police statement that she had had a baby in January 1996. Defense counsel objected and moved for a mistrial "based upon what the Court's previous ruling was. Anything about that baby should not come into evidence...the adopted baby should not come into evidence." (R. 1494). The trial court overruled the objection and denied the motion for mistrial.

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[2] Nickell was the lead investigator who obtained the search warrant for the residence.

On appeal, Gohman claims that the trial court abused its discretion in denying her motion for mistrial because Nickell's testimony was prejudicial and inflammatory because it suggested that she had a cocaine addicted pregnancy. However, Gohman did not object to this testimony on this basis at trial. A party may not present one ground for an objection at trial and advance to another ground on appeal. Bacher v. State, 686 N.E.2d 791, 803 n.6 (Ind. 1997). Therefore, Gohman has waived review of this issue. See Cooley v. State, 682 N.E.2d 1277, 1281 (Ind. 1997).

B. Closing Argument

Prior to closing argument, the trial court admonished the prosecuting attorney "not to make any comment during her closing argument with regard to crack cocaine babies or children that are born

addicted or anything in that regard since it is not in fact...there is not anything about it to begin[] with." (R. 1633-34). During the closing argument, the prosecuting attorney made the following remark:

> Let's put people like Mr. Colwell, who has possessed cocaine with intent to give it to other people, and we don't have to show that he gave it to anybody just that he possessed that with that intent. And, how do we show that intent? The amount that's there, the fact that his live-in girlfriend is addicted...addicted even while she's pregnant and he's giving it to her...

(R. 1720). Defense counsel objected to the remarks and moved for a mistrial. The trial court denied the motion for mistrial, admonished the jury to disregard the comment, and ordered the prosecutor not to discuss the subject.

On appeal, Gohman contends that the trial court abused its discretion in

denying her motion for mistrial. While we might agree with Gohman that the prosecutor's remarks were improper, she was not placed in a position of grave peril. First, the brief comment, when placed in its proper context, was not made in a manner that would tend to incite the jury against Gohman.[3] Second, the trial court promptly admonished the jury to disregard the improper comment. We have stated that a jury is presumed to follow a court's admonishment. Lockhart v. State, 671 N.E.2d 893, 902 (Ind. Ct. App. 1996). Given the strength of the evidence against Gohman, the context in which the comment was made, and the trial court's prompt admonishment to the jury, we conclude the probable persuasive effect of comments on the jury's decision

[3] In fact, the prosecutor even referred to Gohman as a victim, stating: "this man [Colwell] not only possessed with the intent to deliver to his victim [Gohman] here, he possessed with the intent to deliver to Mr. Slaughter…And, what you do with Ms. Gohman is up to you…" (R. 1722).

was minimal. See Schlomer v. State, 580 N.E.2d 950, 955 (Ind. 1991).

Colwell

I. Prosecutorial Misconduct

Colwell contends that the prosecutor engaged in misconduct by (1) violating the trial court's orders as to the admissibility of certain evidence; (2) making improper closing argument; and (3) failing to comply with discovery orders.

When reviewing a claim of prosecutorial misconduct, we must determine: (1) whether the prosecutor engaged in misconduct; and if so, (2) whether that misconduct placed the defendant in a position of "grave peril," which turns on the probable persuasive effect of the misconduct on the jury's decision. Borders v. State, 688 N.E.2d 874, 879 (Ind. 1997). As stated above, a

mistrial is an extreme remedy and is warranted only where lesser-curative measures will not suffice. Seay v. State, 529 N.E.2d 106, 109 (Ind. 1988).

A. Motion in Limine

Gohman and Colwell filed a motion in limine to preclude the state from introducing welfare papers evidencing that Gohman had given a child up for adoption. The trial court made a preliminary ruling precluding the admissibility of the welfare documents. During trial, the prosecutor elicited testimony that a bedroom in the residence contained children's items over the defense counsel's objection that such evidence violated the trial court's preliminary order. The prosecutor later asked Nickell if Gohman had "indicated that she had any children and if they lived with her." (R. 1397). Nickell

responded, "she indicated that she had two (2) children and that one(1) she'd given up..." Counsel objected on the grounds that Nickell was going to testify that Gohman had given a child up for adoption. The court then granted the prosecutor's request to admonish Nickell not to mention that Gohman gave the child up for adoption. Nickell then testified that Gohman had two children but only one lived with her.

Colwell contends that the prosecutor engaged in misconduct when she violated the trial court's order when she "commented on the existence of the documents on several occasions." Colwell's Brief, p. 11. However, as the State correctly points out, the prosecutor did not present any evidence of the existence of "welfare" documents or mention the contents of said

documents. Although Nickell almost testified about the adoption, he was interrupted and informed by the prosecutor not to disclose the adoption. Further, notwithstanding Colwell's contentions to the contrary, nothing in the trial court's order in limine precluded evidence that Gohman had children or that there was a child at the residence. Therefore, the prosecutor did not violate the trial court's order in limine.

B. Closing Argument

Colwell asserts that he was subjected to grave peril when the prosecuting attorney stated during closing argument that "[Gohman] is addicted...addicted even while she's pregnant and [Colwell's] giving it to her..." (R. 1720). We agree with Colwell, and apparently the trial court, that the

prosecuting attorney took undue liberties in making the remark at issue and we do not condone such tactics.[4]

However, the fact that an improper statement was made during closing argument does not necessarily require a retrial. Borders, 688 N.E.2d at 880. We must also look at the probable persuasive effect of the comments on the jury's decision to convict. The trial court, not this Court, was in a better position to consider the prosecutor's conduct and determine its possible prejudicial impact. See Gutierrez v. State, 386 N.E. 2d 1207, 1209 (Ind. 1979). The trial judge concluded that the appropriate curative measure under the circumstances was a prompt admonishment to the jury.

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[4] As noted above, the trial court ordered the prosecuting attorney not to make any remarks in closing argument "with regard to crack cocaine babies or children that are born addicted or anything in that regard..." (R. 1633). It is clear from this language that the trial court also meant to preclude prosecuting attorney from making any implication that Gohman's baby was born addicted.

In light of the overwhelming evidence of Colwell's guilt and the trial court's prompt admonishment to the jury, we cannot say that the trial court abused its discretion in denying the motion for mistrial. See Kent. 675 N.E.2d at 338.

C. State Violations of Discovery Orders

Colwell asserts that a new trial is warranted as a result of the prosecuting attorney's violation of discovery orders. The purpose of pre-trial discovery is to promote justice and to prevent surprise by allowing the defense adequate time to prepare its case. Lloyd v. State, 448 N.E.2d 1062, 1067 (Ind. 1983). "When the State fails to disclose all pertinent information prior to trial, the proper remedy is for the defendant to move for either a continuance or for exclusion of the evidence." Stonebraker v. State, 505 N.E.2d 55, 60 (Ind. 1987). The failure

to request a continuance where it may be the appropriate remedy constitutes a waiver of any error pertaining to noncompliance with a discovery order. Patel v. State, 533 N.E.2d 580, 585 (Ind. 1989). On appeal, Colwell essentially contends that he was denied a fair trial because he "was unable to adequately prepare pretrial motions necessary for his defense and to adequately prepare for trial." Colwell's Brief, p. 19. However, Colwell did not seek a continuance of the trial as a result of the State's alleged untimely compliance with the trial court's discovery orders or complain that he had inadequate time to prepare his defense. Also, Colwell failed to seek to exclude any of the evidence that the State did not timely produce. As a result, we conclude that

Colwell has failed to preserve this issue.

II. Joint Trial

Colwell contends that he was denied his constitutional rights of confrontation and due process when the trial court overruled his pretrial motion to sever and erroneously admitted extrajudicial statements which were attributed to the co-defendant Gohman. Essentially, Colwell contends that the trial court admitted the statements attributed to Gohman without adequately redacting references implicating him. We cannot agree.

A defendant may be denied his constitutional right of confrontation if, in a joint trial, the State introduces the extrajudicial statements of a non-testifying co-defendant which implicate the defendant. Townsend v. State, 533 N.E. 2d 1215, 1224 (Ind. 1989). In

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated when a co-defendant's extrajudicial statement implicating the defendant is admitted into evidence, and the defendant has no opportunity to cross-examine the co-defendant at trial.[5] However, our supreme court, citing Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), has refused to extend the Bruton rule to apply beyond "facially incriminating declarations." Smith v. State, 516 N.E.2d 1055, 1060 (Ind. 1987).

Colwell cites five instances of statements attributed to Gohman which allegedly contains implicating references to him. We address each contention in turn.

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[5] Ind. Code § 35-34-1-11 codifies the Bruton rule.

Colwell first cites to Nickell's testimony that Gohman had indicated that the residence at issue was not her house. He argues that this statement indirectly implicates him because "the reasonable juror would infer that if it was not Ms. Gohman's house, then it was [his], and therefore, all the evidence seized therefrom belonged to [him]." Colwell's Brief, p. 22. However, Gohman's statement does not reference Colwell or facially incriminate him and thus, does not violate Bruton.

Colwell next cites Nickell's testimony that Gohman indicated in her police statement that she had used cocaine prior to the execution of the search warrant. Colwell reasons that but for the statement as to Gohman's prior use of cocaine, he could not have been convicted of maintaining a common

nuisance. We disagree. It was Colwell's attorney, not the State, who initially elicited evidence that Gohman indicated in the police statement that she suffered from cocaine addiction. In fact, during opening statement, counsel attempted to persuade jurors that the State's evidence merely revealed "possession by users of cocaine." (R. 1063). Further, there is nothing in the statement attributed to Gohman which suggests that any of Gohman's prior drug usage occurred at the residence. Therefore, the statement does not facially incriminate Colwell for maintaining a common nuisance.

Colwell also points to Nickell's testimony that Gohman admitted that she and Slaughter had used cocaine in the living room of the residence. Colwell argues that this statement contains the implication that he permitted Gohman and

Slaughter to use drugs at the residence. As noted above, however, counsel contended at trial that Colwell and Gohman possessed cocaine at the residence with the intent to use it, not distribute it. Therefore, there was no dispute that Colwell permitted drug use at the residence.

Colwell next directs this Court to Nickell's testimony that Gohman stated that the food supplements "were used to dilute the cocaine so <u>they</u> could make more money." (R. 1402-3)(emphasis added). We again must reject this argument. First, the trial court sustained counsel's objection to this testimony on other grounds. Second, while it is entirely possible that the jury understood the use of "they" in Nickell's testimony about Gohman's statements to reference both Gohman and Colwell, the

jury could only make this link because of the overwhelming cumulative evidence from other testimony and witnesses. Given the overwhelming evidence of Colwell's guilt, we find any error in the admission of this testimony harmless beyond a reasonable doubt. See Townsend, 533 N.E.2d at 1225.

Finally, Colwell points to Nickell's testimony that Gohman stated that Slaughter had been at the residence on two occasions. However, this statement, stating alone, does not reference whether Colwell was present or had any illegal dealings with Slaughter during Slaughter's first visit to the residence. Thus, the statement attributed to Gohman does not facially implicate Colwell for any of the charged offenses. Colwell was not denied the right to confront and cross-examine Gohman as there was no implicating reference to Colwell in the

statements attributed to Gohman. We find no error.

In a similar argument, Colwell contends that the trial court was required to grant his motion to sever under Ind. Code § 35-34-1-11. Generally, the trial court has discretion to grant or deny a motion for separate trials. Lee v. State, 648 N.E.2d 1143, 1147 (Ind. 1997). However, upon a motion by a defendant, "the court shall order a separate trial of defendants whenever the court determines that a separate trial... is appropriate to promote a fair determination of the guilt or innocence of a defendant." I.C. § 35-34-1-11(b). Our supreme court has stated that a trial court must grant severance of trials where there are mutually antagonistic defenses and the acceptance of one defense precludes the acquittal of the

other. Lee, 684 N.E.2d at 1147. "Upon review, the trial court's decision is measured by what actually occurred at trial rather than what is alleged in the motion." Id. (citations omitted).

Here, Colwell and Gohman did not have mutually antagonistic defenses. To the contrary, Colwell and Gohman presented the identical defense that they possessed cocaine but were not dealers and that Slaughter may have been the dealer. Colwell and Gohman also presented evidence to demonstrate that Colwell had other sources of cash to account for the large sources of money seized at the residence. "It is the defendant's burden to show that a fair trial could not otherwise be had, and `not merely that severance would enhance the prospects for acquittal.'" Id. at

1149 (citations omitted). Colwell has failed to meet this burden.

III. Doyle Violations -- Right Against Self-Incrimination

During direct examination of Nickell, the deputy prosecutor asked if Colwell made "any statement at the time the search warrant was executed," and Nickell responded, "No." (R. 1366). Colwell objected at trial, and argues on appeal, that this testimony violated his constitutional right against self-incrimination. We disagree.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.E.2d 91 (1976), the Supreme Court held it to be fundamentally unfair and a deprivation of due process to use a defendant's post-arrest silence for impeachment purposes after he has been assured through Miranda warnings that he cannot be penalized for

exercising his constitutional rights. A Doyle violation occurs when the prosecution succeeds in making affirmative use of a defendant's conviction. Nicks v. State, 598 N.E.2d 520, 524 (Ind. 1992). Here, the State merely asked Nickell if Colwell made any statement at the time the search warrant was executed. The State made no reference as to whether Colwell (1) was given an opportunity to speak to the police, (2) refused to speak to police officers, or (3) invoked his right to remain silent during the execution of the search warrant. There is no indication that the prosecutor attempted to use Colwell's post-arrest silence to obtain his conviction. We therefore conclude that the testimony challenged by Colwell is, standing alone, too attenuated to amount to a Doyle violation.

IV. Motion to Suppress

Colwell next contends that the trial court erred in overruling his motion to suppress the evidence seized from his residence. The State responds that Colwell has waived this issue on appeal by failing to object to the admissibility of the evidence at trial. In his reply brief, Colwell asserts that his claim in his motion to suppress is a constitutional violation which cannot be waived.

Our supreme court has repeatedly noted that a trial court's denial of a motion to suppress does not preserve error. See Poulton v. State, 666 N.E.2d 390, 393 (Ind. 1996); Connell v. State, 470 N.E.2d 701, 704 (Ind. 1984). The proper method of preserving error for appellate review is an objection to the admission of the allegedly illegally obtained evidence at the time it is offered into evidence during trial.

Poulton, 666 N.E.2d at 393. Because this issue was not properly preserved for review, we will not disturb the trial court's ruling on the admissibility of the statements. See id.

V. Motion to Reveal Identity of Informant

Colwell next argues that the trial court erred in overruling his motion to reveal the identity of the State's confidential informant. Specifically, Colwell asserts that the informant's identity was imperative to his defense "due to the nature of the crimes charged and the fact that the search warrant was issued solely on the content of an alleged taped buy made by an unidentified person." Colwell's Brief, p. 31. He further asserts that the suppression issues were an integral part of his defense and that he should have been able to challenge the validity of the search

warrant by attacking the truthfulness and the reliability of the informant.

The general rule in Indiana prevents disclosure of the identity of a confidential informant unless the defense can prove the necessity of such a disclosure. Adamov v. State, 536 N.E.2d 281, 284 (Ind. 1989). The defense has the burden of proving that disclosure is relevant and helpful to the defense or necessary to a fair trial. Id. Here, Colwell has failed to meet this burden. Colwell has not shown how the informant's testimony would have been exculpatory or led to exculpatory evidence. Further, even if the trial court had erred in refusing Colwell's motion to reveal the identity of the informant, reversal still would not be required. As Colwell concedes, disclosure of the informant's identity was relevant only to the extent that it affected the admissability of the

evidence seized at the residence pursuant to the search warrant. Because Colwell did not challenge the admissability of this evidence at trial, Colwell cannot show that he was harmed by the trial court's refusal to reveal the identity of the informant.[6]

VI. Admissibility of Evidence

Colwell claims that the trial court erroneously admitted certain evidence which he contends was irrelevant and highly prejudicial. We review trial court rulings admitting or excluding evidence under an abuse of discretion standard. Pannell v. State, 686 N.E.2d 824, 826 (Ind. 1997). Only relevant

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[6] Colwell also asserts that the trial court erred in denying him an opportunity to review the tape which was the sole basis for the search warrant. He then asserts that "[w]ithout the actual tape or a transcribed copy of it, Appellant can only contend that it does not exist, if it doesn't, the warrant obtained is invalid and the evidence seized should have been inadmissible." Colwell's Brief, p. 31. As noted in Section V, Colwell did not object at trial to the admissibility of the evidence seized during the execution of the search warrant. Therefore, any error in denying Colwell an opportunity to review the tape was harmless.

evidence is admissible. Ind. Evidence Rule 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. Moreover, "when a trial court erroneously rules to exclude or admit certain evidence, if its 'probable impact on the jury, in light of all evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties, the error is harmless.'" Schwestak v. State, 674 N.E.2d 962, 965 (Ind. 1996)(citation omitted).

A. Procedure for Obtaining Warrant

During direct examination, the prosecutor asked Nickell, "[C]ould you tell the Jury just briefly how an officer goes about seeking a search warrant?" (R. 1276). Over counsel's objection, Nickell was permitted to testify as follows:

> ...myself or other police officers will receive information about criminal activity.
>
> *****
>
> An investigation will result after receiving that information. The facts gathered from that investigation...if they lead to a vehicle or residence or to a person...if we believe that one of those locations or a person I then contact the Prosecutor or we then present those facts to a Court and a Court will determine if there is probable cause to exist...
>
> *****
>
> The Court will hear the facts that our investigation revealed and then will make a determination whether or not those facts support the probable cause necessary to issue the warrant...a search warrant for the person, vehicle, building or residence.

(R. 1281-82, 1284).

On appeal, Colwell contends that the trial court erred in admitting this testimony because such evidence was irrelevant and prejudicial. He argues that "[a] reasonable juror would be misled to conclude from the testimony that criminal activity must have been going on at the residence or a search warrant would not have been issued." Colwell's Brief, p. 33. Assuming without deciding that this testimony was improperly admitted, Colwell cannot show how his substantial rights have been prejudiced. As noted earlier, Colwell's counsel conceded at trial that criminal conduct--i.e., possession of drugs for personal use--occurred at the residence at the time of the execution of the search warrant. We therefore conclude that

any error in the admission of the evidence was harmless.

B. Gohman's Children

Colwell also contends that the trial court erred in admitting irrelevant and prejudicial testimony that (1) Gohman was addicted to cocaine while pregnant; (2) one of Gohman's children had been given up for adoption; and (3) one of Gohman's children lived at the residence. We agree with Colwell that the admitted evidence regarding Gohman's children had no relevance to any fact of consequence in this case. Nevertheless, we see no likelihood of prejudice to Colwell's substantial rights requiring us to order a new trial. First, as noted above, the State did not admit any evidence of an adoption. Second, the jury's reaction to the evidence of Gohman's children

is speculation at best. Finally, the State introduced overwhelming evidence of Colwell's guilt. Colwell conceded that he possessed the large amount of cocaine seized at the residence. The State introduced testimony of a drug transaction between Colwell and Slaughter just prior to the execution of the search warrant. Further, the evidence showed that police seized electronic scales, baggies, and over $10,000 in cash from the residence. We find no reversible error.

We affirm.

GARRARD, J., and FRIEDLANDER, J., concur.